Western New England Law Review

Volume 8 *8 (1986)*
Issue 2

Article 2

1-1-1986

CONSTITUTIONAL HISTORY—DEVELOPMENT OF ADMIRALTY JURISDICTION IN THE UNITED STATES, 1789-1857

William W. Adams

NOTES

CONSTITUTIONAL HISTORY—DEVELOPMENT OF ADMIRALTY JURISDICTION IN THE UNITED STATES, 1789-1857

I. INTRODUCTION

The federal constitutional grant of "all cases of admiralty and maritime jurisdiction"[1] was the center of bitter controversy throughout much of the first half of the nineteenth century. In 1789, when the Constitution was adopted, admiralty jurisdiction here and in England was limited to a handful of maritime cases arising on the high seas.[2] Nevertheless, by 1857,[3] federal judges sitting in admiralty had acquired a jurisdiction which permitted them to hear cases arising wholly within a state and between citizens of the same state. Such a development cut across the Diversity Clause as well as the states' righters' attitudes towards the territorial integrity of individual states. Consequently, the debate over the proper reach of admiralty jurisdiction figured prominently in the constitutional and political crises which culminated in the Civil War.

This article traces the development of federal admiralty jurisdiction from its modest beginnings in the constitutional grant to the Civil War, when federal district courts sitting in admiralty acquired the jurisdiction they have today. Because American admiralty jurisdiction was almost always considered in light of English and colonial precedent, it is necessary to examine in some detail the jurisdiction of the

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1. U.S. CONST. art. III, § 2.

2. English admiralty jurisdiction in 1802 was "confined in matters of contract, to suits for seamen's wages, or those on hypothecations; in matters of tort to actions for assault, collision, or spoil; and in quasi-contracts to actions by part owners for security, and actions of salvage." 12 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 692 (1973) (quoting A. BROWNE, 2 CIVIL LAW 122 (1802)). Browne was Professor of Civil Law at the University of Dublin, and his two volume work was frequently cited as authority by federal courts. Marshall cited Browne in Jennings v. Carson, 8 U.S. (4 Cranch) 2, 23 (1807).

3. The last sustained dissents to the Supreme Court's expansive interpretation of the admiralty grant appeared in Jackson v. Magnolia, 61 U.S. (20 How.) 296 (1857).

English High Court of Admiralty and the colonial vice-admiralty courts before turning to the activity of the federal courts after 1789.

II. ENGLISH AND AMERICAN ADMIRALTY JURISDICTION BEFORE 1789

The jurisdiction of the English High Court of Admiralty in the eighteenth century was the product of several centuries of ultimately unsuccessful quarrelling with the common law courts over jurisdictional boundaries.[4] The common law courts triumphed during the seventeenth century. Through vigorous use of the writ of prohibition they succeeded in restricting admiralty jurisdiction to matters arising exclusively on the high seas.[5] Subject matter jurisdiction as such did not exist, for the locale of the incident or transaction giving rise to the action was determinative. Thus, a writ would issue enjoining an admiralty proceeding when part of the transaction occurred on land.

The colonial vice-admiralty courts, like the English High Court of Admiralty to which they were subordinate, were similarly subject to the writs of prohibition issuing from colonial common law courts. The vice-admiralty courts nevertheless possessed greater latitude in deciding cases which would have drawn a writ of prohibition in England. Moreover, because of special long-standing statutory authority, the vice-admiralty courts had concurrent jurisdiction with the colonial common law courts over actions arising from breaches of the revenue, trade, and navigation laws. Such cases in England were tried only at common law before a jury. During the Revolution and the Confederation, the individual states established admiralty courts whose jurisdiction reflected the traditional English common law gloss on admiralty jurisdiction. Thus, on the eve of the adoption of the Constitution, admiralty jurisdiction in the United States bore the contours of contemporaneous English practice.

Two statutes passed during the reign of Richard II restricted the jurisdiction of the English admiralty courts. By the first of these statutes, passed in 1389, admirals and their deputies were forbidden to "meddle henceforth of anything done within the realm, but only of a thing done upon the sea."[6] By the second, passed in 1391, admiralty was deprived of jurisdiction over "all manner of contracts, pleas and

4. *See* F. WISWALL, JR., THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800, AN ENGLISH STUDY WITH AMERICAN COMPARISONS 1-19 (1970).

5. For example, an action on a debt created on the high seas could be tried only at common law if the payment was on land. Bridgeman's Case, 80 Eng. Rep. 162 (K.B. 1614).

6. 13 Rich. 2, ch. 5.

quereles and of all other things done or arising within the bodies of counties, as well by land as by water."[7] The English common law courts had a centuries-long quarrel with the admiralty courts over jurisdictional boundaries. Each claimed that the other encroached on its jurisdiction. By the middle of the seventeenth century the common law courts acquired the upper hand.[8]

The common law courts' success was owing principally to the labors of Lord Coke who developed effective use of the writ of prohibition *pro defectu jurisdictionis*.[9] A defendant in an admiralty proceeding applied to the King's Bench for a writ of prohibition, and if the court agreed that common law properly had jurisdiction, a writ issued enjoining the admiralty judge from hearing the case. This naturally had the effect of forcing the plaintiff in the admiralty proceeding to bring his action at common law if he wanted to maintain it.

The King's Bench, basing its authority for the writs of prohibition on the statutes of Richard II, built a substantial body of case law defining admiralty jurisdiction. In determining what was within the body of a county, the King's Bench gradually excluded admiralty from jurisdiction over navigable inland waterways, ports, and havens. Thus, the locality over which the admiralty courts had jurisdiction was the area within the ebb and flow of the tide, except, of course, where the tide intruded into the body of a county.

As part of the restriction to locale, the common law courts ingeniously justified a rule excluding admiralty from jurisdiction over most maritime contracts. Reasoning that both making and performance were part of a contract, the common law took jurisdiction over contracts made on land, though the contemplated performance was very clearly within the ebb and flow of the tide and without the body of a county. Naturally, only torts committed within the ebb and flow of the tide and without the body of a county were properly cognizable in admiralty.[10]

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7. 15 Rich. 2, ch. 3. A third statute, 2 Hen. 4, ch. 11, enacted in 1400, gave a defendant wrongfully sued in admiralty a cause of action for double damages at common law.

8. *See generally*, 1 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 548-59 (1971).

9. The common law courts also used writs of certiorari, supersedeas, and mandamus to prevent admiralty courts from hearing certain cases. *Id.* Another device was the use of nontraversable fictions in pleading, such as an allegation that the underlying transaction occurred at Cheapside. *See* Talbot v. Three Brigs, 1 Dall. 95, 99 (Pa. 1784).

10. "Torts committed on the high seas; contracts made on the high seas to be there executed; proceedings in rem on bottomry bonds executed in foreign parts; the enforcement of judgments of foreign Admiralty courts; suits for the wages of mariners—were almost the only pieces of jurisdiction which it was allowed to exercise." 1 W. HOLDSWORTH, *supra* note 8, at 557.

Although the subject of much debate in the United States during the first few decades of the nineteenth century,[11] it is clear that the colonial vice-admiralty courts in North America were at least formally bound by the restrictions placed on the English High Court of Admiralty, to which the vice-admiralty courts were inferior.[12] The few extant reports of vice-admiralty proceedings show frequent references to the phrase "within the body of a county" and occasional references to the statutes of Richard II.[13] Moreover, some colonies attempted to incorporate the statutes of Richard II into local legislation.[14] Colonial common law courts likewise possessed authority to issue writs of prohibition in appropriate cases and frequently did so.[15]

Nevertheless, it is equally clear that the vice-admiralty courts sometimes decided cases which, had they been brought in admiralty courts in England, would have drawn writs of prohibition.[16] This latitude undoubtedly led to the blurring of jurisdictional lines between colonial common law and vice-admiralty courts. This probably represents the beginnings of a judicial tendency to ignore niceties of technical problems in jurisdictional matters in the interest of applying

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11. "In point of fact the vice admiralty court of Massachusetts, before the Revolution, exercised a jurisdiction far more extensive, than that of the admiralty in England." DeLovio v. Boit, 7 F. Cas. 418, 442 n.46 (C.C.D. Mass. 1815) (No. 3,776) (Story, J.). C. HOUGH, in his Introduction to REPORTS OF CASES IN THE VICE ADMIRALTY OF THE PROVINCE OF NEW YORK AND IN THE COURT OF ADMIRALTY OF THE STATE OF NEW YORK, 1715-1788, xviii (1925), found that New York practice substantiated the "celebrated remark of Justice Story." Campbell, dissenting in Jackson v. Magnolia, 61 U.S. (20 How.) 296, 336 (1857), disagreed. "The opinion of Justice Story, in the case of *DeLovio v. Boit*, is celebrated for its research, and remarkable, in my opinion, for its boldness in asserting novel conclusions, and the facility with which authentic historical evidence that contradicted them is disposed of." *See* Wiener, *Notes on the Rhode Island Admiralty, 1727-1790*, 46 HARV. L. REV. 44 (1932); and Wroth, *The Massachusetts Vice Admiralty Court and the Federal Admiralty Jurisdiction*, 6 AM. JOUR. LEGAL HIS. 250 (1962).

12. 11 W. HOLDSWORTH, A HISTORY OF ENGLISH LAW 60-61 (1973).

13. *See, e.g.*, Kennedy v. 32 Barrels of Gunpowder (1754), *cited in* C. HOUGH, *supra* note 11, at 82; Castriot v. Nicoll (1759), *cited in* C. HOUGH, *supra* note 11, at 167. *See also* Potter v. Greyhound, R.I. Adm. Pap. V, 83, 90-93 (1747), *cited in* RECORDS OF THE VICE-ADMIRALTY COURT OF RHODE ISLAND, 1716-1752, at 413 (D. Towle, ed. 1936).

14. *See, e.g.*, "An Act to declare the Extension of Several Acts of Parliament made since the Establishment of a Legislature in this Colony: and not declared in said Act to extend to the Plantations," enacted by the colony of New York in 1767 in E. BROWN, BRITISH STATUTES IN AMERICAN LAW, 1776-1836, at 357 (1974). Such efforts by colonial assemblies to incorporate English statutory law wholesale into colonial law were generally unsuccessful. Legislating for the colonies was theoretically the prerogative of the monarch. Consequently much colonial legislation was disallowed by orders in council. *See id.* at 17. Thus the limitation on the jurisdiction of the vice-admiralty courts was imposed derivatively from those imposed on the parent High Court of Admiralty and not by virtue of colonial enactments.

15. *See* Wiener, *supra* note 11; Wroth, *supra* note 11.

16. *See* discussion in Wroth, *supra* note 11.

substantive law.[17]

In addition to this traditional limited jurisdiction over maritime matters, the vice-admiralty courts possessed long-standing statutory authority to decide cases brought for violation of navigation, revenue, and trade laws.[18] This was a significant deviation from English practice where such cases were heard at common law in the Court of Exchequer.

By vesting the colonial vice-admiralty courts with this jurisdiction, Parliament sought to preserve revenue from the notorious unwillingness of colonial juries to return verdicts unfavorable to their neighbors.

The colonists reacted vehemently to this practice when, in 1764, Parliament began passing revenue acts designed to reduce the enormous national debt which England had acquired during the French and Indian War.[19] The common law right to a jury trial acquired enormous significance. Colonial assemblies sent to England grievances bitterly remonstrating to the crown for extending admiralty jurisdiction beyond its "ancient limits."[20] The number of traditional maritime cases brought in the vice-admiralty courts diminished gradually until the outbreak of hostilities in 1775, evidence of the low esteem into which the vice-admiralty courts had fallen.[21]

At the urging of the Continental Congress, the admiralty courts which the states created to replace the defunct vice-admiralty courts typically had juries, either mandatorially or at the election of either party. They were principally for the trying of prize cases, although many states provided instance[22] jurisdiction as well.[23] During the Confederation, appeals from state admiralty court adjudications in

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17. An analogous process was under way in common law as the strict rules of pleading began to yield to substantive categories in the late eighteenth century. *See* W. NELSON, AMERICANIZATION OF THE COMMON LAW, THE IMPACT OF LEGAL CHANGE ON MASSACHUSETTS SOCIETY, 1760-1830, at 69-88 (1975).

18. The first was the Navigation Act of 1696, 7 & 8 Will. 3, ch. 22.

19. The first was the American Act of 1764, 4 Geo. 3, ch. 15. The relationship between the colonies and the vice-admiralty courts is analyzed in C. UBBELOHDE, THE VICE-ADMIRALTY COURTS AND THE AMERICAN REVOLUTION (1960).

20. C. UBBELOHDE, *supra* note 19, at 142-47. *See also* Jackson v. Magnolia, 61 U.S. (20 How.) 296, 330-31 (1857) (Campbell, J., dissenting). Compare Wayne's use of "ancient limits" in Waring v. Clarke, 46 U.S. (5 How.) 441, 456-57 (1847).

21. Wroth, *supra* note 11, at 361.

22. In wartime, admiralty judges were specially commissioned to try cases having to do with captures of vessels and cargo belonging to belligerents. The process involved was strongly analogous to ordinary in rem process in that parties with interests were invited to appear to assert their rights, adjudication followed, and then the vessel was condemned and sold at public auction, the proceeds being divided among interested parties, including the

prize matters were to the Court of Appeals, which was part of the national government. The state appellate courts heard appeals from the instance side of the state admiralty courts.[24]

Beyond doubt, the statutes of Richard II were in force throughout the states. New York, for example, enacted a version of the second statute.[25] Virginia imported English statutes in effect in England before 1607.[26] Other state admiralty courts relied on both the statutes of Richard II and English case law emanating from the King's Bench.[27]

Far from strictly applying the relevant law, some state admiralty courts displayed a willingness to assert jurisdiction in doubtful cases,

> [n]ot from a desire of extending admiralty cognizance, but for this important consideration, that if the decision in favour of the jurisdiction should be erroneous, the doors of the common law are open for redress, and a prohibition may be obtained; but there is no remedy for the erroneous exclusion of parties who apply for the process of the admiralty, the benefit of the laws by which it is governed, and the summary justice it affords.[28]

Thus, the ability of the state admiralty courts to provide a remedy

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captors and the Crown. This was essentially prize jurisdiction. 3 BOUVIER'S LAW DICTIONARY 2723-26 (8th ed. 1914).

Instance jurisdiction was the remainder of admiralty jurisdiction and reflected its civil side, including commercial matters. It was principally the instance jurisdiction of the admiralty courts that incurred the wrath of the common law courts. In the days when admiralty jurisdiction was at its nadir and its instance jurisdiction limited for most practical purposes to in rem proceedings, the distinction between the prize and instance jurisdictions of the admiralty courts was purely formal. 2 BOUVIER'S LAW DICTIONARY 1604 (8th ed. 1914).

23. *See* J.C. Bancroft Davis, *Federal Courts Prior to the Adoption of the Constitution*, 131 U.S. app. at xix-xxii (1888).

24. Ratified on March 1, 1781, the Articles of Confederation, in Article IX, gave Congress the power to establish rules for the hearing of cases of capture and prize. The Court of Appeals itself was created by resolution on January 15, 1780. *Id.* at xxv-xxviii. With the conclusion of hostilities, the need for an appeals court disappeared and the commissions of the three judges comprising the court were "vacated and annulled." *Id.* at xxviii.

25. Putnam, *How the Federal Courts Were Given Admiralty Jurisdiction*, 10 CORNELL L.Q. 460, 463 n. 9 (1925).

26. 1 BENEDICT ON ADMIRALTY §88, at 6-15 (7th ed. 1985).

27. *See, e.g.*, Montgomery v. Henry, 1 Dall. 49, 50 (Pa. 1780); Talbot v. Three Brigs, 1 Dall. 95, 98 (Pa. 1784); Clinton v. Hannah, 5 F. Cas. 1056 (Pa. Adm. Ct. 1781) (No. 2,898); Shrewsbury v. Two Friends, 22 F. Cas. 42 (S.C. Adm. Ct. 1786) (No. 12,819).

28. Dean v. Angus, 7 F. Cas. 294, 297 (Pa. Adm. Ct. 1785) (No. 3,702). In Montgomery v. Henry, 1 Dall. 49, 50 (Pa. 1780), the court likewise announced its intention to "endeavour to enlarge its jurisdiction, rather than a place should remain subject to no controul."

received a consideration at least equal to the question whether the court properly had jurisdiction over the case. From the complaints of disappointed plaintiffs who later encountered admiralty judges favoring a strict interpretation of the statutes of Richard II, it is apparent that the state admiralty courts often upheld jurisdiction simply because no one had challenged it.[29] Whatever hostility the colonial vice-admiralty courts engendered must have dissipated gradually during the years of the Confederation.

The salient weakness of the appellate structure as to prize cases was the dependence of the national Court of Appeals on state courts to enforce reversals of state court decisions. Frequently state courts ignored such reversals. In *United States v. Peters*,[30] a case which eventually reached the Supreme Court, the admiralty court of Pennsylvania refused to enforce the decree of the Court of Appeals because jury findings were nonreviewable under Pennsylvania law.[31] The efforts of the appellants in the *Peters* proceeding to obtain enforcement generated a lengthy period of considerable tension between Pennsylvania and the federal government.[32]

III. ADMIRALTY JURISDICTION IN THE CONSTITUTION AND THE JUDICIARY ACT OF 1789

The Court of Appeals was the only national judicial power permitted under the Articles of Confederation. This national admiralty power was carried over into and expanded in the Constitution, principally because the framers thought that the federal government had an essential interest in handling adjudications where the rights of foreigners were likely to be involved.[33] Also, it had become clear during the Confederation that allowing state courts to check the exercise of federal judicial power interfered with strong central government. The

29. Shrewsbury v. Two Friends, 22 F. Cas. 42, 45 (S.C. Adm. Ct. 1786) (No. 12,819). *See also* Clinton v. Hannah, 5 F. Cas. 1056, 1057 (Pa. Adm. Ct. 1781) (No. 2,898). "[T]he practice of former times doth not justify the admiralty's taking cognizance of their suits." *Id.*

30. 9 U.S. (5 Cranch) 206 (1809).

31. Admiralty appeals were traditionally de novo. *See* Yeaton v. United States, 9 U.S. (5 Cranch) 363 (1809).

32. At one point Governor McKean of Pennsylvania called out the state militia to prevent service of federal process. The full account appears in Davis, *supra* note 23, at xxix-xxxv. *See also* Doane's Administrators v. Penhallow, 1 Dall. 218 (Pa. 1787) (Common Pleas); Penhallow v. Doane's Administrators, 3 U.S. (3 Dall.) 84 (1795).

33. Chief Justice John Jay explained the reason for the constitutional grant in Chisholm v. Georgia, 2 U.S. (2 Dall.) 419, 475 (1793): "[B]ecause, the seas are the joint property of nations, whose right and privileges relative thereto, are regulated by the law of nations and treaties, such cases necessarily belong to national jurisdiction."

framers therefore vested the federal government with jurisdiction over *all* cases of admiralty and maritime jurisdiction so as to remove any possible impediments to the exercise of federal power to provide final and decisive determination in admiralty cases. Owing to the moribund state of instance jurisdiction, the framers probably did not foresee that purely domestic cases would bring the federal judiciary into direct conflict with the states' traditional authority to hear most maritime cases in common law courts.

Modern research has not supported Justice Wayne's dictum that "the words 'all cases of admiralty and maritime jurisdiction,' as they now are in the constitution, were in the first plan of government submitted to the convention."[34] Of the three plans submitted in 1787, denominated the Virginia Plan, the Pinckney Plan, and the New Jersey Plan, the only references to any aspects of admiralty jurisdiction were prize, piracies and felonies on the high seas, federal revenue, and cases in which foreigners might be involved.[35] The only authentic manuscript evidence containing a reference to admiralty jurisdiction appears among the papers of George Mason. His papers contain a proposed draft of the Constitution with the interlineation "& in Cases of Admiralty Juris^{dn}," probably inserted by John Rutledge, a member of the Committee of Detail and successor to John Jay as Chief Justice of the Supreme Court.[36]

Documentary evidence supports the theory that the implications of instance jurisdiction were not fully worked out at either the convention or at the state ratifying conventions. Alexander Hamilton in the *Federalist Papers* cursorily dismissed the topic:

> The most bigoted idolizers of state authority have not thus far shown a disposition to deny the national judiciary cognizance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations relative to the public peace.[37]

At the Virginia ratifying convention Governor Randolph endorsed admiralty jurisdiction as a fitting adjunct of national government:

> As our national tranquillity, reputation, and intercourse with foreign nations may be affected by admiralty decisions, as they ought therefore to be uniform, and as there can be no uniformity if there

34. Waring v. Clarke, 46 U.S. (5 How.) 441, 457 (1847).

35. Putnam, *supra* note 25, at 466.

36. *Id.* at 468.

37. 1 CONGRESS AND THE COURTS: A LEGISLATIVE HISTORY, 1787-1977, at 108 (Reams and Haworth, eds. 1978).

> be thirteen distinct independent jurisdictions, the jurisdiction ought to be in the Federal judiciary.[38]

Nowhere does it appear that a grant of admiralty jurisdiction to the federal government was founded on anything other than considerations of international comity.[39]

The Judiciary Act of 1789[40] does not shed much light on early attitudes towards admiralty jurisdiction. The Act created the district courts[41] and vested them with exclusive cognizance of all

> civil causes of admiralty and maritime jurisdiction including all seizures under laws of impost, navigation or trade of the United States, where the seizures are made, on waters which are navigable from the sea by vessels of ten or more tons burthen, within their respective districts as well as upon the high seas; saving to suitors, in all cases, the right of a common law remedy, where the common law is competent to give it; . . .[42]

Jury trial was available for all issues of fact "in all causes except civil causes of admiralty and maritime jurisdiction."[43] The Supreme Court was given authority to issue writs of prohibition to the district courts "when proceeding as courts of admiralty and maritime jurisdiction."[44]

The Act accorded well with a traditional understanding of admiralty jurisdiction. The provision reserving jurisdiction in the common law courts when they were competent to provide a remedy, commonly known as the Saving to Suitors Clause, suggested that state courts sitting at common law could oust federal admiralty jurisdiction in many cases. The authority to issue writs of prohibition seemed congruent

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38. *Id.* at 91.

39. Although not specifically aimed at curbing the instance jurisdiction of the federal courts, Maryland proposed an amendment which would have made jury trials available for all trespasses occurring within the body of a county. The amendment also would have given the state courts concurrent jurisdiction in all such cases. Also, appeals were to be limited to matters of law. *Id.* at 57.

Aside from preserving jury trial, "the boasted birthright of Englishmen," the ratifying convention hoped to eliminate the necessity for parallel court systems where the state was competent to provide adequate adjudication. This would reduce the confusion and expense which would follow from "double courts and double officers." The convention also found it was necessary to prevent the expansion of federal jurisdiction. Otherwise, federal jurisdiction might "swallow up the state jurisdictions, and consequently sap those rules of descent and regulations of personal property, by which men hold their estates." *Id.*

40. 1 Stat. 73, ch. 20.

41. *Id.* at § 3.

42. *Id.* at § 9.

43. *Id.*

44. *Id.* at § 13. In United States v. Peters, 3 U.S. (3 Dall.) 121 (1795), the Supreme Court issued a writ of prohibition to district court judge Peters, enjoining him from hearing a prize case in violation of a treaty with France.

with contemporaneous English practice. The phraseology "admiralty and maritime jurisdiction" merely tracked the constitutional language which had received a construction applying to international relations.

It was not perfectly clear, however, that traditional jurisdictional rules applied. Giving federal courts sitting in admiralty jurisdiction over revenue matters was reminiscent of the English colonial scheme which had so enraged the colonists. The grant of jurisdiction over navigable waters in the district courts' individual districts did not accord with the traditional ban on jurisdiction within the body of a county. The power to issue writs of prohibition was vested in the Supreme Court, which was also the court of appeal, and not in a state common law court. If the federal judiciary began to favor an expanded admiralty jurisdiction, the implications were obvious. State courts were without judicial means to restrict the federal judiciary.

IV. ADMIRALTY JURISPRUDENCE OF THE EARLY DISTRICT COURTS

Most early district court judges entertained little or no doubt regarding the character of their admiralty jurisdiction. They considered themselves bound by English precedent. It was early agreed that statutes in effect in England before the emigration of our ancestors were likewise in effect in the United States to the extent that local conditions permitted.[45] Moreover, many of the early federal judges had held positions in the court systems before the Revolution and during the Confederation and were familiar with the traditional jurisdictional rules.[46] Finally, they had no legal material which suggested that matters should be otherwise.

Until 1801 when Hay and Marriott's *Reports*, covering proceedings in the English High Court of Admiralty from 1776 to 1779, were published, there were no widely available English or American admiralty reports. The only treatise on admiralty jurisdiction and general maritime law used in the colonies was Francis Clerke's *Praxis Curiae Admiralitatis Angleliae* which had been published in England in 1677 from notes made the preceding century. During the seventeenth century jurisdictional struggles between the common law and the admi-

45. *See* E. BROWN, *supra* note 14, at 15-16. *See also* Morris's Lessee v. Vanderen, 1 Dall. 64, 67 (Pa. 1782).

46. For example, Richard Peters, district court judge for Pennsylvania, had served as register for the Philadelphia vice-admiralty court from 1771 to 1776. William Drayton, district court judge for South Carolina, was admiralty judge of the state during the Confederation. Francis Hopkinson, also district court judge for Pennsylvania, was admiralty judge for Pennsylvania during the Confederation. *See* Wroth, *supra* note 11, at 365-66.

ralty courts there emerged two more or less polemical works defending admiralty jurisdiction. They were John Godolphin's *A View of the Admiral Jurisdiction*, published in 1661, and Richard Zouch's *The Jurisdiction of the Admiralty of England Asserted*, published in 1663. Neither appears to have been used in the colonies.[47]

Not surprisingly, works which viewed admiralty according to the lights of the common law were widely available. Luminaries such as Sir William Blackstone and Sir Matthew Hale had included admiralty jurisdiction in their treatises on English law. Charles Molloy's *De Jure Maritimo*, published in 1676 and representative of the common law viewpoint, was available in the colonies during the eighteenth century.[48] Moreover, the enormous body of reported common law cases, including Coke's *Fourth Institute*,[49] was available.

Principal reliance on what were essentially English common law views of admiralty jurisdiction shaded the American courts' understanding of both jurisdiction and substantive law. In theory, general maritime law as practiced in the English admiralty courts was a comprehensive and coherent system. The effect of the common law courts' pattern of issuing prohibitions based on locality was to eclipse parts of this system, leaving the parts which remained visible to be taken as substantive law and, incidentally, matter over which admiralty had undoubted jurisdiction.[50] The result was that jurisdictional and substantive issues became mixed.

American judges were not well-versed in civil law generally or maritime law. They tended to consider that common law embraced maritime law:

> [T]he change in the form of our government has not abrogated all the laws, customs and principles of jurisprudence, we inherited from our ancestors, and possessed at the period of our becoming an independent nation. The people of these states, both individually and collectively, have the common law, in all cases, consistent with the change of our government, and the principles on which it is founded. They possess, in like manner, the maritime law, which is part of the common law, existing at the same period; and this is peculiarly within the cognizance of courts, invested with maritime

47. C. ANDREWS, Introduction to RECORDS OF THE VICE-ADMIRALTY COURTS OF RHODE ISLAND, *supra* note 13, at 3 n.2. *But see* Talbot v. Three Brigs, 1 Dall. 95, 98-99 (Pa. 1784).

48. C. HOUGH, *supra* note 11, at xix.

49. Published posthumously in 1644.

50. *See generally*, The Underwriter, 119 F. 713, 728-42 (D. Mass. 1902), where Judge Lowell in a very scholarly opinion discusses this phenomenon in the setting of maritime liens.

> jurisdiction; although it is referred to, in all our courts on maritime questions.[51]

Of course, no English common law court ever applied the maritime law as the rule of decision. Thus, in *Boreal v. Golden Rose*,[52] Judge Bee was hopelessly wide of the mark when he began his discussion of a master's right to hypothecate:

> The question before me is of considerable importance to commerce in general; it must be decided, therefore, on general principles, and according to the course of the civil law. All the cases quoted upon this occasion were determined in courts of common law, but upon the principles of the civil law.[53]

He went on to cite a dictum of Lord Mansfield, apparently under the assumption that it was a statement of civil law.[54] In fact, the dictum merely summed up both common law and maritime law remedies available to a materialman without mentioning an essential distinction between domestic and foreign bottomry bonds.

Alongside this largely unconscious tendency to reach issues of substantive law before jurisdiction, a minority of district court judges considered admiralty jurisdiction to be based solely on subject matter without regard for locality. The most outspoken was Judge Winchester in Maryland. In *Stevens v. Sandwich*[55] which concerned a shipwright's right to proceed in rem against a domestic vessel, Winchester upheld jurisdiction. He boldly asserted that "the statutes 13 & 15 Rich. II. have received in England a construction which must at all times prohibit their extension to this country. The reports of decisions in the courts of that country are perfectly irreconcilable."[56] Having concluded that jurisdiction attached because of the maritime subject matter of the contract, he applied maritime law and held that a

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51. Thompson v. Catharina, 23 F. Cas. 1028, 1030-31 (D. Pa. 1795) (No. 13,949).

52. 3 F. Cas. 901 (D. S.C. 1798) (No. 1,658).

53. *Id.*

54. The dictum was from Rich v. Coe, 98 Eng. Rep. 1281, 1283 (K.B. 1777): "Whoever supplies a ship with necessaries, has a treble security. 1. The person of the master. 2. The specific ship. 3. The personal security of the owners, whether they know of the supply or not." See similar use of the same dictum in North v. Eagle, 18 F. Cas. 327, 328 (D. S.C. 1796) (No, 10,309); Shrewsbury v. Two Friends, 22 F. Cas. 42, 44 (S.C. Adm. Ct. 1786) (No. 12,819).

55. 23 F. Cas. 29 (D. Md. 1801) (No. 13,409).

56. *Id.* at 30. Other courts did not necessarily have Winchester's confidence. In The Grand Turk, 10 F. Cas. 956, 957-58 (C.C.S.D. N.Y. 1817) (No. 5,683), the court was willing to disregard the English rule prohibiting a master's suit in rem for wages, if the origin of the rule were attributable to the common law courts' overreaching, but queried whether any change might better be made by the legislature.

maritime lien had arisen implicitly from the contract to supply.[57]

On the whole, it is clear that even by the first decade of the nineteenth century American judges were both consciously and unconsciously making determinations based on subject matter and confusing substantive and jurisdictional law, without applying traditional criteria regarding locality.[58]

V. EARLY SUPREME COURT APPROACH TO EXPANDING ADMIRALTY JURISDICTION

The Supreme Court's first brush with the question of expanding jurisdiction occurred in *United States v. La Vengeance*,[59] which was decided in 1796. This case involved a seizure of a vessel charged with violating a statute prohibiting trade with Santo Domingo. The United States appealed from the circuit court's reversal of a forfeiture. Attorney General Charles Lee argued that the offense was criminal and so not cognizable on the instance side of admiralty. Lee supported his argument by pointing to English practice which was to hear such cases at common law in the Court of Exchequer.[60] In a brief per curiam opinion, the Court upheld admiralty jurisdiction and held that the exportation of arms was a water transaction; that the cause was civil in

57. *Id.* at 31. Winchester's opinion is all the more remarkable because he used continental, rather than English, maritime law to provide the substantive rule. *See also* the analyses in Wilmer v. Smilax, 30 F. Cas. 84 (D. Md. 1804) (No. 17,777) and The Mary, 16 F. Cas. 938 (C.C. D. Ct. 1824) (No. 9,187). The prevailing view was that "the admiralty law of Great Britain is the admiralty law here." Woodruff v. Levi Dearborne, 30 F. Cas. 525, 527 (C.C.D. Ga. 1811) (No. 17,988).

58. Towards the end of the eighteenth century, the King's Bench itself appeared to be shifting towards a more liberal view of admiralty jurisdiction. In Menetone v. Gibbons, 100 Eng. Rep. 568, 568-69 (K.B. 1789), Lord Kenyon said, "Then if the Admiralty has jurisdiction over the subject matter, to say that it is necessary for the parties to go upon the seas to execute the instrument, borders upon absurdity." Justice Buller concurred in the idea that admiralty jurisdiction depended upon subject matter. *Id.* at 569. In Smart v. Wolff, 100 Eng. Rep. 600, 613 (K.B. 1789), Buller suggested a cautious reading of Lord Coke, who "seems to have entertained not only a jealousy of, but an enmity against, that jurisdiction."

59. 3 U.S. (3 Dall.) 297. The first admiralty appeal to the Supreme Court was Glass v. Betsey, 1 U.S. (3 Dall.) 6, 15 (1794), in which the Court held that the district courts possessed both prize and instance jurisdiction. This resolved the confusion generated by Lord Mansfield's opinion in Lindo v. Rodney, an otherwise unreported decision appended to Le Caux v. Eden, 99 Eng. Rep. 375, 385-92 (K.B. 1781), which had overemphasized the distinction between the two sides of admiralty jurisdiction. Resolution of this issue was important because the authority of the district courts to resolve differences arising from prize cases originally adjudicated during the Confederation in the state admiralty courts was in doubt. See discussion in Jennings v. Carson, 13 F. Cas. 540 (D. Pa. 1792) (No. 7,281).

60. *La Vengeance*, 3 U.S. at 299-300.

nature; and that Sandy Hook, the place of seizure, was obviously on the water. In the *United States v. Sally*,[61] the court summarily affirmed jurisdiction on similar facts.

The implications of the Court's decision in *La Vengeance*, brief as it was, were far-reaching. The seizure had occurred in a locale which, under the common law, was within the body of a county. Also, the Court peremptorily rejected an argument premised upon English practice at the time of the adoption of the Constitution. The Court allowed jurisdiction under the Judiciary Act of 1789. This Act had placed prosecutions for violations of impost, trade, and navigation in admiralty. Did this mean that Congress could place various subject matters in admiralty without regard for English jurisprudence?

In 1808 Lee appeared for the owner to argue the case of *United States v. Betsey and Charlotte*,[62] another forfeiture for violation of the trade laws with Santo Domingo. The vessel had been seized within the port of Alexandria, definitely within the body of a county. Chief Justice Marshall considered the jurisdictional issue settled by *La Vengeance*. Lee explained that he hoped "to show that this case is distinguishable," pointing out that the earlier case was "not so fully argued as it might have been."[63] Justice Chase uncharitably recalled that the argument in *La Vengeance* "was no great thing,"[64] but Lee was allowed to proceed.

Lee then advanced a barrage of arguments, most of them resting on the premise that admiralty jurisdiction in the United States depended on English practice at the time of the adoption of the Constitution. "The question, then, is, whether, according to the understanding of the people of this country at that time, a seizure of a vessel, within the body of a county, for breach of a municipal law of trade, was a case of admiralty cognizance."[65] Because such cases were not among those of admiralty cognizance "congress could not make them such, nor by forcing them into that class, deprive the citizen of his right to trial by jury."[66] Congressional intent was evidenced in the Saving to Suitors Clause which entitled the suitor to a common law remedy.[67] Lee reminded the Court that vice-admiralty jurisdiction over matters

61. 6 U.S. (2 Cranch) 406 (1805).
62. 8 U.S. (4 Cranch) 443.
63. *Id.* at 446.
64. *Id.*
65. *Id.* at 447.
66. *Id.* at 449.
67. *Id.*

of revenue had been one of the principal grievances of the colonists.[68] As an afterthought, Lee alluded to the fifth and seventh amendments to show that an accused was entitled to a jury trial and could not be deprived property without due process of law.[69]

Marshall, writing for the Court, avoided the implication of Lee's premise that admiralty jurisdiction was fixed at the adoption of the Constitution by arguing that it was merely the place of seizure, not commission of the offense, which determined jurisdiction.[70] In Marshall's view, the Judiciary Act of 1789 simply distinguished between seizures on land and those at sea, obviously putting the latter in admiralty.[71] The argument based on the fifth and seventh amendments apparently took the Court by surprise, but it too was dismissed: "The only doubt which could arise would be upon the clause of the constitution respecting the trial by jury. But the case of the Vengeance settles that point."[72]

For some time after *Betsey and Charlotte* the Court was relatively silent on the question of admiralty jurisdiction. Although the decision in that case had broad implications, the court generally construed it to apply solely to violations of revenue and trade laws. Thus, *Betsy and Charlotte* did not affect the course of instance jurisdiction in admiralty. In fact, in *The Thomas Jefferson*,[73] decided in 1825, Justice Story dismissed an argument for extending admiralty jurisdiction on the basis of this exception by distinguishing it as a "statuteable provision." Not until the 1840's did the Supreme Court again take the lead in defining admiralty jurisdiction.

VI. JUSTICE JOSEPH STORY AND *DELOVIO V. BOIT*

The Supreme Court's treatment of the forfeiture cases suggested the possibility of expanding admiralty jurisdiction, but like the vice-admiralty courts' jurisdiction over trade and revenue matters, the forfeiture cases seemed anomalous. In the absence of controlling decisions from the Supreme Court, the district and circuit courts were able

68. *Id.* at 448. This invocation of the colonists' sentiments did not carry much weight. During oral argument Justice Chase bluntly pointed out: "The reason of the legislature for putting seizures of this kind on the admiralty side of the court was the great danger to the revenue if such cases should be left to the caprice of juries." *Id.* at 446. This, of course, was the same reason which had prompted Parliament to vest the vice-admiralty courts with the same jurisdiction.

69. *Id.* at 451.

70. *Id.* at 452.

71. *Id.*

72. *Id.*

73. 23 U.S. (10 Wheat.) 428, 429.

to develop admiralty jurisdiction incrementally, sometimes simply because of the lack of guidance in close cases, but also as part of a general tendency, often unperceived, to expand jurisdiction.

By far the most enthusiastic and most powerful proponent of an expansive interpretation of admiralty jurisdiction was Justice Joseph Story, who joined the Court in 1812.[74] Story had practiced admiralty law in Marblehead and Salem, Massachusetts, before joining the Court and had acquired an extensive education in the field.[75] Like Chief Justice John Marshall, Story wanted the federal judiciary to provide an attractive forum for litigators with mercantile interests so that a uniform commercial law could emerge under the supervision of federal judges.[76] Accordingly, Story directed his attention to the instance side of admiralty jurisdiction.

Story sought to develop instance jurisdiction in two ways. First, he desired to break the hold of English precedent on admiralty jurisdiction by subordinating the English emphasis on locality to subject matter jurisdiction. Locality was then simply one criterion for determining whether the subject matter of a given action was sufficiently maritime in complexion to bring it within admiralty jurisdiction. Second, even though locality was displaced as the determinative criterion, it was still necessary to fix the federal admiralty jurisdiction within workable territorial limits which would give the federal courts enough cases to enable them to develop a body of substantive law. Sitting on the First Circuit in Boston, Story was able, with the help of two extraordinarily competent district court judges, Ashur Ware[77] and John

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74. Two excellent biographies are G. DUNNE, JUSTICE JOSEPH STORY AND THE RISE OF THE SUPREME COURT (1970) and R. NEWMYER, SUPREME COURT JUSTICE JOSEPH STORY, STATESMAN OF THE OLD REPUBLIC (1985).

75. Story's extensive knowledge of and facility with substantive maritime law are well illustrated in The Emulous, 8 F. Cas. 697 (C.C. D. Mass. 1813) (No. 4,479), a prize case decided soon after Story joined the Court. Later, in The Nestor, 18 F. Cas. 9 (C.C.D. Me. 1831) (No. 10,126), Story perfected the concept of maritime lien which had been slowly evolving since the days of Clerke's *Praxis*.

76. *See* R. NEWMYER, *supra* note 74, at 281-89.

77. United States district court judge for the district of Maine from 1822 to 1866, Ware was early recognized as an authority on admiralty law. He wrote the articles on admiralty in Bouvier's Law Dictionary. Ware's expansive views of admiralty jurisdiction are well evidenced in the famous case of Steele v. Thacher, 22 F. Cas. 1204 (D. Me. 1825) (No. 13,348), in which he sustained jurisdiction over a suit brought by a father against the master of a ship on which the plaintiff's minor son had signed and travelled to the West Indies. "If it be said that [this tort] had its inception on land, and within the body of a county, the answer has been already given, that the English cases on this point are not held to be law in this country; but where the substance of the tort is committed on the high seas, when it there has its consummation, if it be all one continued act, the jurisdiction of the admiralty will attach to the whole matter, though part of it may have taken place on land

Davis,[78] to accomplish much of what he was not able to do on the Supreme Court.

Taking advantage of the wave of nationalism which swept the country at the conclusion of the War of 1812, Story began building upon themes of admiralty jurisdiction.[79] In 1815 he decided *DeLovio v. Boit*,[80] a case involving a marine insurance policy. *DeLovio* is often considered the cornerstone of modern American admiralty jurisdiction.[81]

DeLovio was really an essay on the history of admiralty jurisdiction in England. Story intended it to serve as precedent for putting all of maritime contract law within admiralty jurisdiction. The bulk of the opinion consisted of an extensive analysis of the cases upon which Coke had relied in his *Fourth Institute* which was still regarded as the bible for common lawyers on the subject of admiralty jurisdiction. In lawyerly fashion, Story distinguished and explained away Coke's conclusions. Story's thesis was that, before the encroachments of the common law, English admiralty had enjoyed extensive jurisdiction including all matters pertaining to the sea within the ebb and flow of the tide.[82] He concluded that the lack of uniformity of decisions at English common law justified reappraisal in light of American experience.[83]

Turning to the constitutional language and its duplicate in the Judiciary Act of 1789, Story concluded that "maritime" was intended

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and within the body of a county." *Id.* at 1206-7. *See also* The Huntress, 12 F. Cas. 984, 987-94 (D. Me. 1840) (No. 6,914). See the remarks of the Cumberland Bar on his retirement from the federal bench, 30 F. Cas. 1349.

78. United States district court judge for the district of Massachusetts from 1801 to 1841, Davis was likewise known for his expertise in admiralty law. See the remarks of United States district attorney, Franklin Dexter, and the Suffolk Bar, 30 F. Cas. 1302.

79. Story frequently used dicta to develop his views on admiralty jurisdiction. *See* Martin v. Hunter's Lessee, 14 U.S. (1 Wheat.) 304, 335 (1816); Thomas v. Lane, 23 F. Cas. 957, 960 (C.C. D. Me. 1813) (No. 13,902); and Jenks v. Lewis, 13 F. Cas. 539 (C.C. D. Me. 1825) (No. 7,279).

80. 7 F. Cas. 418 (No. 3,776). Boston businessmen had taken a policy of insurance on a Spanish ship engaged in the foreign slave trade. The insurer refused to pay for loss owing to capture. Davis agreed with the insurers that the district court sitting in admiralty did not have jurisdiction over marine insurance policies, thereby assuring an appeal. Story had begun writing the 26,000 word opinion before he actually heard the case during October Term 1815. His opinion was immediately published in Gallison's Reports, 1815-16, where it occupied eighty double-columned pages and received prompt distribution. *See* R. NEWMYER, *supra* note 74, at 123.

81. "This great opinion ought to be thoroughly studied by those who aim at solid attainments in this department of the law." Footnote to reported decision in Federal Cases, *DeLovio*, 7 F. Cas. at 418.

82. *Id.* at 441.

83. *Id.*

to amplify traditional admiralty jurisdiction so that it corresponded to the "ancient and original jurisdiction, inherent in the admiralty of England by virtue of its general organization."[84]

To bolster his argument, Story tried to show that the jurisdiction of the vice-admiralty courts was more extensive than contemporary English practice. He reached this conclusion by relying on the Crown's commissions to colonial governors making them vice-admirals. The governors were empowered to grant cognizance over

> all causes civil and maritime, and in complaints, contracts, offenses or suspected offenses, crimes, pleas, debts, exchanges, accounts, charter parties, agreements, suits, trespasses . . . [extending] throughout all and every the seashores, public streams, ports, fresh waters, rivers, creeks and arms, as well of the sea. . . .[85]

Returning to the matter at hand, Story concluded that a marine insurance policy was a maritime contract cognizable in admiralty.[86]

Although a holding that an action on a marine insurance policy was cognizable in admiralty was revolutionary,[87] Story's opinion reflected a conservative interpretation. The language of the vice-admirals' commissions purported to assert admiralty jurisdiction over inland waterways, but Story sought only to make admiralty jurisdiction coextensive with tidewater. Even before he had begun writing *DeLovio*, the steamboat Orleans had completed its historic run from Pittsburgh to New Orleans. That occurred in 1811, and traffic on the western rivers grew steadily throughout the decade. Story must have been aware of the significance of technological developments in transportation on waterways as westward migration increased. Yet, while there was some precedent for making admiralty jurisdiction coextensive with tidewater, there was no precedent for extending admiralty jurisdiction to inland waterways. At most, the vice-admirals' commissions evidenced the claims of the prerogative courts, not the actual extent of jurisdiction.

Story was determined to place all maritime contracts in admiralty. Commerce was carried on through contractual arrangements.

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84. *Id.* at 442.

85. *Id.* n.46.

86. *Id.* at 444. In The Volunteer, 28 F. Cas. 1260, 1261 (C.C. D. Mass. 1834) (No. 16,991), Story reflected on the years which had passed since he wrote *DeLovio* and stated his firm conviction that neither "appeals to popular prejudices," "learned and liberal arguments," nor "severe and confident criticism" had managed to convince him that *DeLovio* was wrongly decided.

87. The Supreme Court did not so hold until the decision in New England Mut. Ins. Co. v. Dunham, 78 U.S. (11 Wall.) 1 (1870).

Thus, any emerging body of commercial law would turn on contracts. *DeLovio* was settled law in the First Circuit thereafter. Despite a hint in the opinion that Story would have liked to see it go to the Supreme Court on appeal,[88] neither it nor decisions following *DeLovio* were appealed.[89] The mercantile class in Boston gave *DeLovio* a lukewarm reception but continued to litigate maritime contracts in common law courts.[90]

Story also wrote the opinion for *The Thomas Jefferson*,[91] the first case in which the Supreme Court considered extending admiralty jurisdiction beyond the ebb and flow of the tide. This was an action against a steamboat for seamen's wages for a trip from Shippingport, Kentucky, up the Missouri and back, an itinerary "several hundreds of miles above the ebb and flow of the tide."[92] The district court had sustained admiralty jurisdiction and the plaintiff seamen appealed from the circuit court's dismissal for lack of jurisdiction.

The case had generated considerable controversy while it was at the district court level, because the three owners were brothers of Richard Johnson, United States Senator from Kentucky. Within two weeks after the district court had sustained jurisdiction, Johnson launched a witty and bitter attack on the federal judiciary and proposed a statute which would have limited admiralty jurisdiction to the ebb and flow of the tide.[93]

Moreover, the case came up on appeal in the midst of a heated controversy between the Supreme Court and the state of Kentucky. The Supreme Court had, in *Green v. Biddle*,[94] upheld an attack on Kentucky's occupying-claimant law. This law gave good faith occupants of land belonging to absentee owners the value of their improvements and relieved them of responsibility for debts and rents. The decision provoked considerable hostility because the statute was part of a general scheme of ameliorative legislation intended to mitigate the effects of title fights to land. Moreover, Kentucky was in the midst of a serious fiscal crisis which the Court's decision in *Osborn v. Bank of the United States*[95] probably exacerbated.[96]

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88. *DeLovio*, 7 F. Cas. at 444.

89. In Gloucester Ins. Co. v. Younger, 10 F. Cas. 495, 498-99 (C.C.D. Mass. 1855) (No. 5,487), Justice Curtis expressed doubts as to the validity of the holding in *DeLovio*, but declined to overrule established precedent.

90. *See id.* at 498. *See also* G. DUNNE, *supra* note 74, at 132.

91. 23 U.S. (10 Wheat.) 428 (1825).

92. *Id.* at 429.

93. *See* G. DUNNE, *supra* note 74, at 215-16, 238-39.

94. 21 U.S. (8 Wheat.) 1 (1823).

95. 22 U.S. (9 Wheat.) 138 (1824).

Against this background, Story held that admiralty jurisdiction did not extend to seamen's wages under the circumstances presented in *The Thomas Jefferson*, because the employment was not performed substantially on the sea or on tidewater.[97] Although it is possible to view the decision as an attempt to placate Kentucky, it is more likely that Story was simply adhering to the position he had taken in *DeLovio*. It is also likely that the Court considered *The Thomas Jefferson* an inadequate vehicle for extending admiralty jurisdiction to the western rivers. Nothing about the case gave it a maritime complexion. It was almost impossible to justify extending admiralty jurisdiction. Significantly, Story did not cite any authority for his views. This suggests that he considered the jurisdictional issue well-settled.

Story nevertheless left the Court and Congress an opening which was later to have far-reaching consequences through his agency:

> Whether, under the power to regulate commerce between the States, Congress may not extend the remedy, by the summary process of the Admiralty, to the case of voyages on the western waters, it is unnecessary for us to consider. If the public inconvenience, from the want of a process of analogous nature, shall be extensively felt, the attention of the Legislature will doubtless be drawn to the subject.[98]

Here was a revival of the suggestion made *sub silentio* in *La Vengeance* and its progeny that Congress possessed power to create and expand admiralty jurisdiction beyond its traditional limits. The Court nonetheless seemed content to have stabilized a rule as to locality.

In later cases the tidewater rule proved workable. In *Orleans v. Phoebus*[99] the Court held that there was no admiralty jurisdiction over a possessory suit brought by a part owner against a steamboat because the waters plied were, with the exception of its terminus in New Orleans, beyond the ebb and flow of the tide. In *United States v. Coombs*,[100] the Court held that goods washed above the high water mark were not within admiralty jurisdiction for the purposes of a federal statute which made their theft a felony.

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96. Decided the same term as *The Thomas Jefferson* were Wayman v. Southard, 23 U.S. (10 Wheat.) 1 (1825) and Bank of the United States v. Halstead, 23 U.S. (10 Wheat.) 51 (1825). Both were challenges to the constitutionality of Kentucky legislation. In both, the Court avoided the constitutional issues by holding that the federal process statute did not incorporate the statutes in issue.

97. *The Thomas Jefferson*, 23 U.S. at 429.

98. *Id.* at 430.

99. 36 U.S. (11 Pet.) 175 (1837).

100. 37 U.S. (12 Pet.) 72 (1838).

VII. BEGINNING OF STATES' RIGHTS OBJECTIONS

The states' rights judiciary was becoming aware that the federal courts' interpretations of admiralty jurisdiction were quietly expansive. In a sarcastic concurrence—which was really more of a dissent—Story's nemesis, Justice Johnson, announced in *Ramsay v. Allegre*[101] that he thought "it high time to check this silent and stealing progress of the Admiralty in acquiring jurisdiction to which it has no pretensions." Johnson's target was a dictum which had appeared in Story's 1819 opinion in *The General Smith*,[102] which said that had that suit been brought in personam rather than in rem the Court would not have hesitated to sustain jurisdiction. *The General Smith*, like *Ramsay v. Allegre*, was a materialman's action for contract damages for ship repairs. Johnson, who had been sitting on the Court when *The General Smith* was decided, had apparently not noticed that it suggested jurisdiction based on subject matter and that it ignored the long-standing English rule barring materialmen's suits from admiralty jurisdiction, because such contracts were made within the body of a county.

The General Smith was an odd decision because it contained several strands of thought which had been present in the lower federal courts' decisions for some time. Story asserted a general admiralty jurisdiction over maritime contracts consistent with such decisions as *Stevens*[103] and *DeLovio*.[104] But, having acknowledged general jurisdiction over the subject matter, Story inexplicably applied state law to see whether there was a right to proceed in rem.[105] Whether Story had fallen victim to the prevalent confusion between substantive and jurisdictional law or was simply deferring to municipal law in the unsettled period before *Swift v. Tyson*[106] is impossible to say. Maryland

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101. 25 U.S. (12 Wheat.) 611, 614 (1827), (Johnson, J., concurring). In *Ramsay*, a materialman had received a negotiable promissory note payable in four months for his services. The note had not been paid. The issue on appeal was whether acceptance of the note had extinguished the underlying debt, which was based on maritime consideration, and so constituted a waiver of admiralty jurisdiction. *Id.* at 612. Writing for the Court, Marshall dismissed the appeal because the record did not show that the note had been negotiated or surrendered. Johnson, of course, was challenging the premise that were it not for the note admiralty had jurisdiction.

102. 17 U.S. (4 Wheat.) 438.

103. *See supra* text accompanying notes 55-57.

104. *See supra* text accompanying notes 81-89.

105. *The General Smith*, 17 U.S. at 438.

106. 41 U.S. (16 Pet.) 1 (1842). Section 34 of the Judiciary Act of 1789 had provided that state law should provide the substantive rule of law for trial at common law so long as there was no constitutional or federal statute in conflict on the point in issue. In *Swift*, Story held that "laws" as used in the Act did not incorporate the ever-changing judicial law

had not modified the common law position which limited materialmen to in personam actions on contract once the vessel was no longer in their possession.

Under municipal law there was no lien to enforce in court. Consequently, although admiralty was the correct forum, the plaintiff had sought the wrong remedy. Johnson had probably not noticed the implications of Story's line of reasoning because the result was the same as it would have been under the traditional rules for materialmen's actions for supplies and repairs in domestic ports.

In *Ramsay*, Johnson sought to rectify his oversight by preparing an historical analysis of the development and inhibition of admiralty jurisdiction from the statutes of Richard II to the nineteenth century. He declared that "the test of admiralty jurisdiction" was "wherever a prohibition will issue, the jurisdiction has been taken away from the admiralty, or it never possessed it."[107] Thus, he argued that the interpretation of the English common law was determinative of American admiralty jurisdiction.

Johnson confined his discussion to tracing the historical development of admiralty jurisdiction, without enlarging on the theme of states' rights which underlay his concern. Obviously, if the ability of a common law court to take jurisdiction ousted admiralty, then the state courts could control the bulk of maritime contract actions, just as the English common law courts had before them. Johnson's historical test actually went further than fixing American admiralty jurisdiction by English standards. His test suggested that developments in the common law could remove more matters from the admiralty jurisdiction of the federal courts, which were limited by the English practice.

Nevertheless, Johnson perceived a flaw in the American plan of federalism and was filled with alarm:

> I am fortifying a weak point in the wall of the constitution. Every advance of the Admiralty is a victory over the common law; a conquest gained upon the trial by jury. The principles upon which alone this suit could have been maintained, are equally applicable to one half the commercial contracts between citizen and citizen. Once establish the rights here claimed, and it may bring back with it all the Admiralty usurpations of the fifteenth century. In England there exists a controlling power, but here there is none. Congress

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of the states, thereby enabling federal judges to follow their own logic as to the substantive rule of law in a given case. Although *The General Smith* was in admiralty and not at common law, it is possible that Story's application of Maryland's substantive law was influenced by the rule suggested in the Act.

107. *Ramsay*, 25 U.S. at 615.

> has, indeed, given a power to issue prohibitions to a District Court, when transcending the limits of the Admiralty jurisdiction. But who is to issue a prohibition to us, if we should ever be affected with a partiality for that jurisdiction?[108]

Johnson clearly understood the expansion of admiralty jurisdiction, especially over contracts, as a horrific instance of the encroachment of central authority against which the states could not protect themselves. In violation of the Diversity Clause,[109] citizens from the same state could litigate in federal rather than state courts. That the rule of decision was from the municipal law did not appease him. So long as admiralty could be held to a handful of traditionally recognized actions, the threat was minimal, but an incursion into the commercial transactions of the states could cripple the states' economic and political power. Since the expansion of American admiralty jurisdiction occurred through judicial interpolation of the constitutional grant, only a decorous judicial restraint could prevent a debacle.

Story's application of municipal law in *The General Smith* opened the door for state-created rights to be enforced in admiralty. In 1833, the Court held, in *Peyroux v. Howard*,[110] that admiralty had jurisdiction in an in rem proceeding brought by a materialman when state law gave him a lien on the vessel. Apparently since the action was in rem and not in personam, and since it came from state law, Johnson did not feel obliged to comment.

VIII. ABANDONMENT OF THE TIDEWATER RULE

Notwithstanding the states' righters' mounting alarm over the gradual introduction of subject matter jurisdiction, the tidewater limitation continued to reserve to the state courts a considerable proportion of commercial maritime adjudications. This was because the

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108. *Id.* at 640. Johnson was not always consistent in his argument for strict application of the English jurisdictional rules. Only two years earlier in Manro v. Almeida, 23 U.S. (10 Wheat.) 473, 490 (1825), he upheld the use of admiralty attachment of the chattels of an absconded defendant, while noting that although such attachments were no longer used in England, they were among the "peculiarities which have been incorporated into the jurisprudence of the United States." Significantly, he cited Clerke's *Praxis* as his authority. *Id.* at 491-92. Admiralty attachment as outlined by Clerke was intended to secure in personam jurisdiction. Johnson tried to explain away that aspect in *Ramsay*, 25 U.S. at 630-31. In Woodruff v. Levi Dearborne, 30 F. Cas. 525, 527 (C.C.D. Ga. 1811) (No. 17,988) Johnson announced in dicta a willingness to depart from the English rule prohibiting domestic materialmen from obtaining liens against domestic vessels, if the owner, "though present, when work and materials are furnished, is transient and non-resident."

109. U.S. CONST. art . III, § 2, cl.1.

110. U.S. (7 Pet.) 324.

waters involved were not within the ebb and flow of the tide. During the 1840's, the Court as well as Congress began aggressively to expand the district courts' admiralty jurisdiction. By the end of the 1850's, subject matter jurisdiction emerged paramount, and inland waterways carrying commerce between two or more states were included within admiralty jurisdiction.

In 1845, Congress passed the Great Lakes navigation act,[111] which extended the jurisdiction of the district courts to the Great Lakes and the navigable waters connecting them. The Act was palpably a follow-up to Story's dictum in *The Thomas Jefferson*, and it seems likely that Story himself wrote it.[112]

The act was a curious congeries. Its wording conveyed the impression that it had been passed under the Commerce Clause.[113] The district courts were given "the same jurisdiction in matters of contract and tort . . . as is now possessed by the said courts in cases of . . . steamboats and other vessels employed in navigation and commerce upon the high seas, or tide waters, within the admiralty and maritime jurisdiction of the United States."[114] Provisions for a jury trial at the election of either party and for a concurrent remedy at the common law "where it is competent to give it"[115] anticipated criticism. Although the full impact of the act was not apparent when it was passed, it implicitly suggested that Congress could enlarge the admiralty jurisdiction of the district courts at will.

In 1847, the Court considered for the first time whether there was admiralty jurisdiction for action in tort arising within the ebb and flow of the tide, but within the body of a county. In *Waring v. Clarke*,[116] a collision case arising on the Mississippi River, the court rejected the defendant's argument that admiralty jurisdiction was limited to those cases cognizable in English admiralty courts either at the time of the Revolution or at the adoption of the Constitution. Justice Wayne, following Story's reasoning in *DeLovio*, argued that the practice of the vice-admiralty courts was more extensive than that of the contemporaneous English courts.

Starting with what he asserted to be historical fact, Wayne built upon a series of rhetorical questions suggesting that the participants in

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111. 5 Stat. 726, ch. 20.

112. *See* Jackson v. Magnolia, 61 U.S. (20 How.) 296, 342 (1857) (Campbell, J., dissenting).

113. U.S. CONST. art. I, § 8, cl. 3.

114. 5 Stat 726, ch. 20.

115. *Id.*

116. 46 U.S. (5 How.) 441 (1847).

the Revolution and the Constitutional Convention knew what the ancient jurisdiction of admiralty had been, as shown by the grievances to the crown.[117] From these inferences Wayne drew the further inference that these same individuals intended that the constitutional grant should embody the ancient jurisdiction free from the arbitrary inhibitions of the common law.[118] Significantly, he objected to a reading of English jurisdictional law into the Constitution because it would interfere with Congress's right to legislate.[119]

Also drawing upon the English experience, the defendant suggested that the Saving to Suitors Clause of the Judiciary Act of 1789 embodied the English rule of exclusive jurisdiction in the common law courts when the common law could provide a remedy.[120] Wayne responded that the competency of the common law to provide a remedy was relevant only on the issue of choice of forum. The systems of law were co-equals, with overlapping jurisdiction. Therefore, the common law courts had only concurrent jurisdiction.[121]

Turning to the specific issue at hand, Wayne relied on the term "sea" as admiralty had traditionally defined it, meaning tidewater. The exclusion of admiralty from jurisdiction over matters arising within the body of a county was based on the statutes of Richard II, which "were never in force in any of the colonies."[122] Accordingly, admiralty had jurisdiction over torts so long as they occurred within the ebb and flow of the tide, whether they occurred on the open sea or on inland waterways.

Viewed narrowly, Wayne's decision simply carried the tidewater rule to its logical extreme. The Supreme Court had evidently found it to be a workable rule. But from the point of view of states' righters, the rationale of the opinion was devastating.

Wayne had thrown off the restraining statutes of Richard II and the English precedent founded on them.[123] He also apparently had rejected the idea that admiralty jurisdiction had been fixed at all at the

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117. *Id.* at 454.
118. *Id.* at 460.
119. *Id.* at 457.
120. *Id.* at 452.
121. *Id.* at 458-59.
122. *Id.* at 461.
123. To sustain jurisdiction Wayne was compelled to cast aside English precedent, even if it meant resting on the rather slender and largely unverifiable argument that colonial practice was broader than English practice. As late as 1832 the English High Court of Admiralty had held that, under the statutes of Richard II, it did not have jurisdiction over a collision occurring on a river within the ebb and flow of the tide, but within the body of a county. The Public Opinion, 166 Eng. Rep. 289 (Adm. 1832).

time of the constitutional grant, except to the extent that the nebulous, undocumented practice of the vice-admiralty courts fixed it. Startling, too, was the suggestion that Congress had an open field to pass legislation affecting the extent of admiralty jurisdiction. Until that time the states' righters had, like Johnson in *Ramsay*, considered the English interpretation determinative. Now Wayne was apparently suggesting that Congressional imagination was the sole limit to admiralty jurisdiction. Wayne had cut admiralty jurisdiction loose from its constitutional moorings without suggesting how it might be confined.

Wayne had already decided the same issue while on circuit in Georgia. In *Bulloch v. Lamar*,[124] two negro slaves in a canoe had drowned when a steamboat ran them down in the Savannah River within the ebb and flow of the tide. Citing *Peyroux* for the proposition that admiralty had jurisdiction coextensive with tidewater, Wayne declared that "it is not an open question."[125] He went on to say that he did not mean

> to assert that the grant of admiralty power . . . is limited to the ebb and flow of the tide—that admiralty jurisdiction may not be maintained under the judicial act, as it is, above the flow of the tide, or that congress may not legislate to give such jurisdiction upon navigable waters, beyond the ebb and flow of the tide, and upon our great inland seas. It may be done without making any encroachment upon the trial by jury, in the legitimate use of that institution. I do not say, it must be done so.[126]

Wayne had a wildly expansive view of both admiralty jurisdiction and the power of Congress and the judiciary to define it.

First argued during the term *Waring* was decided, *New Jersey Steam Navigation Company v. Merchants' Bank*[127] followed in 1848 after reargument. On January 13, 1840, the steamboat Lexington, which ran a regular packet service between New York City and Stonington, Connecticut, burned and sank in Long Island Sound. Several thousand dollars in specie belonging to Merchants' Bank were lost. Merchants' Bank subsequently sued on the contract for carriage. Relying on the traditional argument that contracts formed within the body of a county were not cognizable in admiralty, New Jersey Steam challenged the district court's jurisdiction.

Justice Nelson, writing for the majority, conceded that if "the

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124. 4 F. Cas. 654 (C.C.D. Ga. 1844) (No. 2,129).
125. *Id.* at 658.
126. *Id.*
127. 47 U.S. (6 How.) 344.

grant of power in the Constitution had reference to the jurisdiction of the admiralty in England at the time, and is to be governed by it," then there would be no jurisdiction in admiralty.[128] He shied away from Wayne's approach, though. Instead, he pointed to the "practical construction" which the constitutional grant had received in the legislature and federal judiciary at all levels.[129] Using the Judiciary Act of 1789 and the Court's decision in *La Vengeance*, Nelson argued that "at a very early day" American practice had diverged from the English.[130] He also noted that contracts of shipwrights, materialmen, and pilots were regularly heard in the district courts.[131] He concluded that the purely incidental fact that the action was in personam was insufficient to take the case out of admiralty.[132] Whereas Wayne had made some attempt to find historical support antedating the constitutional grant to support his interpretation, Nelson considered it sufficient to rely on later interpretations. Again, there was the implicit suggestion that Congress and the federal judiciary had unlimited power to define admiralty jurisdiction.

Woodbury wrote the dissent in *Waring*,[133] with two justices generally concurring in his dissent. The burden of Woodbury's argument was that it was the Court's responsibility to interpret admiralty jurisdiction according to the received tradition until Congress chose to enact legislation, such as the Great Lakes navigation act, which expanded the jurisdiction of the district courts. In this way, the highly prized right to trial by jury could be retained and the sometimes noxious effects of admiralty jurisdiction and maritime law mitigated.[134]

Daniel, the sole dissenter[135] in *New Jersey Steam Navigation Company*, did not share Woodbury's somewhat complacent willing-

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128. *Id.* at 386.

129. *Id.*

130. *Id.* at 386-87.

131. *Id.* at 390-91.

132. *Id.* at 390.

133. Justices Daniel and Grier concurred in the dissent.

134. *Waring*, 46 U.S. at 492-96. Woodbury had done extensive research on the issue of admiralty jurisdiction in preparation for his opinion in United States v. New Bedford Bridge, 27 F. Cas. 91 (C.C.D. Mass. 1847) (No. 15,867), and had discovered several state reporters which mentioned the statutes of Richard II. *See* KILTY, A REPORT OF ALL SUCH ENGLISH STATUTES AS EXISTED AT THE TIME OF THE FIRST EMIGRATION OF THE PEOPLE OF MARYLAND . . . 223 (1811); Commonwealth v. Gaines, 4 Va. (2 Va. Cas) 172 (1819). See his concurrence in New Jersey Steam Navigation Company, 47 U.S. at 422. Woodbury concurred in upholding jurisdiction in this case because he thought the action sounded in tort on the high seas.

135. Justices Catron and Woodbury concurred in the judgment of the Court on the ground that the action sounded in maritime tort against a bailee.

ness to accept congressional expansion as a means of giving jurisdiction to the district courts. Daniel took the same line of argument as Johnson had in *Ramsay*. Daniel argued that English precedent controlled and that admiralty jurisdiction was fixed according to the practice in England in 1789.[136] He marshalled an impressive body of support from English cases and commentaries. Like Johnson, he also relied on the few reported cases from the state admiralty courts during the Confederation to show to what extent admiralty jurisdiction was known and practiced in the United States immediately before the adoption of the Constitution.[137] He considered the majority's behavior to be wholly inappropriate in a government of explicitly designated powers. He concluded that the case was "palpably a proceeding *in personam* upon an express contract, entered into between the parties in the city of New York" over which admiralty could have no jurisdiction whatsoever.[138]

Waring and *New Jersey Steam Navigation Company* were authority for the denial of all English precedent and the assumption of all maritime contracts. The Court had not offered to delineate admiralty jurisdiction except to establish the limitation of tidewater apparently as a rule of convenience. The confusion concerning what Congress could and could not do and whether the Court might be able to act without Congress appalled states' righters like Daniel. Even more alarming was the Court's willingness to rely on the most tenuous of inferences in the historical record to support expansion of jurisdiction. This use of the record suggested a desire to assume power at all costs.

The final blow to the traditionalists came in *Genesse Chief v. Fitzhugh*,[139] which involved a collision of a sailing vessel and a steamboat on Lake Ontario. The defendants challenged the Great Lakes navigation act of 1845. At issue was the much vaunted power of Congress to create admiralty jurisdiction. The defendants' counsel clearly laid out the dangers implicit in sustaining constitutionality:

> If this law can be sustained, it is not perceived why Congress may not extend the jurisdiction of the federal courts to every case of contract or tort, growing out of the extensive trade and commerce, now carried on, by land and water, among the States of the Union; and thus draw within the cognizance of these courts one half of the litigation of the country.[140]

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136. *New Jersey Steam Navigation Company*, 47 U.S. at 396-97.
137. *Id.* at 397-410.
138. *Id.* at 416.
139. 53 U.S. (12 How.) 443 (1851).
140. *Id.* at 448.

Whatever the benefits were of a uniform commercial law, such a law imperilled states' rights.

Chief Justice Taney peremptorily rejected the idea that the act was based on the Commerce Clause, which almost everyone thought was the case, by distinguishing sharply between jurisdictional issues and regulation of commerce.[141] He upheld the act under the constitutional grant of admiralty jurisdiction, arguing that the limitation to tidewater was based on a fundamental misapprehension of historical fact. English geography made tidewater and navigable water synonymous. American courts were accustomed to the forms of English pleadings and had simply carried over the allegation of ebb and flow of the tide without examining its functional content.[142] The real test of admiralty jurisdiction was whether the waters in question were navigable in fact. If so, admiralty had jurisdiction and the presence or absence of a tide was immaterial.[143]

Taney bolstered his analysis by referring to the clause in the Judiciary Act of 1789 which gave admiralty jurisdiction of waters navigable from the sea.[144] This implied one limitation on what could be considered navigable waters for the purposes of admiralty jurisdiction. He went further, though, and imposed the limitation that the waters carry commerce between two or more states or territories.[145] Thus, Taney used the Commerce Clause's underlying principle to check admiralty jurisdiction.

Genesse Chief is frequently cited as an example of Taney's pragmatic nationalism.[146] Certainly, it bears the hallmark of Taney's typical avoidance of doctrinaire solutions and constitutional formalism in the interest of practical accommodation. Taney was careful to emphasize the international character of admiralty jurisdiction and the advantages of admiralty jurisdiction "for the safety and convenience of commerce, and the speedy decision of controversies, where delay would often be ruin."[147] Yet, such considerations certainly seemed premised upon the judiciary's "views of expediency and necessity," as the sole dissenter Daniel bitterly pointed out.[148]

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141. *Id.* at 451-52.

142. *Id.*

143. *Id.* at 454.

144. *Id.* at 457.

145. *Id.* at 454.

146. *See, e.g.*, R. NEWMYER, THE SUPREME COURT UNDER MARSHALL AND TANEY 112 (1968).

147. *Genesee Chief*, 53 U.S. at 453-54.

148. *Id.* at 465.

Genesse Chief nevertheless provided stability. While it was true that admiralty assumed jurisdiction over inland waterways, Taney had masterfully dissolved the confusion and tension which had surrounded the exercise of admiralty jurisdiction in the district and circuit courts. Wayne in *Waring* and Nelson in *New Jersey Steam Navigation Company* had succeeded in shearing admiralty jurisdiction from any principled standards. These decisions gave the impression that Congress, by virtue of the Commerce Clause, could amend jurisdiction. To put a new face on the Commerce Clause by infusing the federal court system with jurisdiction under its aegis was an extremely risky undertaking. This difficulty justified a pragmatic response fixing admiralty jurisdiction by a workable formula and, at the same time, extending its benefits to a larger community.

From the point of view of judicial administration, it made sense to extend admiralty jurisdiction to inland waterways. District courts in Kentucky, New York, and Pennsylvania had for some time been hearing cases arising on nontidal waters.[149] It seemed pointless to distinguish between cases arising on tidal and nontidal water when the actions were identical in character.

Daniel, in dissent, lamented reliance on the alleged jurisdiction of the vice-admiralty courts which "no investigation has ever been able to place upon any clear and indisputable authority."[150] He was appalled by the "doctrine at present promulged [*sic*] by this court, which is based upon assumptions still more irregular in my view, still more dangerous than that above adverted to."[151]

The last sustained dissents on admiralty jurisdiction over inland waterways appeared in *Jackson v. Magnolia*.[152] Two steamboats had collided in the Alabama River, which was wholly within the state of Alabama and debouched into the Gulf of Mexico, about two hundred miles above the ebb and flow of the tide.

Justice Grier, who had sided with the dissent in *Waring*, wrote the majority opinion sustaining jurisdiction. The defendants argued that the district court lacked jurisdiction because the collision occurred above tidewater and within the body of a county.[153]

The defendants relied on the fact that the Alabama River, unlike most other inland waterways, lay wholly within the state of Alabama

149. *See* Note, *From Judicial Grant to Legislative Power: The Admiralty Clause in the Nineteenth Century*, 67 HARV. L. REV. 1214, 1218 nn. 28, 29 (1954).

150. *Genesee Chief*, 53 U.S. at 464.

151. *Id.*

152. 61 U.S. (20 How.) 296 (1857).

153. *Id.* at 298.

and that, therefore, actions arising from occurrences thereon were matters for state adjudication. Grier responded that the states' surrender of admiralty jurisdiction to the federal government in 1789 included "jurisdiction over the harbors, creeks, inlets, and public navigable waters, connected with the sea."[154] Therefore, he argued, there was no distinction between waters which flowed through or by two or more states and waters which lay wholly within a state. This, coupled with the Court's rejection of English precedent as binding in *Waring*, completely undermined any argument based on the purely local nature of the occurrence.[155]

The defendants also argued that the Court should narrowly construe *Genesee Chief*. They suggested that the Great Lakes navigation act had conferred jurisdiction only over specified waterways which did not include the Alabama River.[156] Grier did not dispute the implication that Congress must act before the district courts could assume jurisdiction over nontidal waters. Rather, he pointed out that, in the Judiciary Act of 1789, Congress had in fact given the district courts jurisdiction over waters "navigable from the sea."[157] He said that the Great Lakes navigation act was necessary to extend admiralty jurisdiction to the lakes because they were not included among waters to which Congress had extended jurisdiction.[158] The Alabama River was navigable from the sea and so came within the definition of the Judiciary Act.

Daniel wrote a long dissent, reviewing the history of the English and American admiralty jurisdictions. The dire consequences of the Court's decisions were clear:

> Under this new regime, the hand of Federal power may be thrust into everything, even into a vegetable or fruit basket; and there is no production of a farm, an orchard, or a garden, on the margin of these water-courses, which is not liable to be arrested on its way to the next market town by the *high admiralty power*, with all its parade of appendages; and the simple, plain homely countryman, who imagined he had some comprehension of his rights, and their remedies under the cognizance of a justice of the peace, or of a county court, is now, through the instrumentality of some apt fomenter of trouble, metamorphosed and magnified from a country attorney into a proctor, to be confounded and put to silence by a

154. *Id.*
155. *Id.* at 298-99.
156. *Id.* at 300.
157. *Id.*
158. *Id.* at 300-1.

> learned display from Roccus de Navibus, Emerigon, or Pardessus, from the Mare Clausum, or from the Trinity Masters, or the Apostles.[159]

Perhaps this passage, better than any other, reveals the soul of Southern agrarian politics.[160]

Grier's analysis in *Jackson* concluded the Court's search for rationales for defining admiralty jurisdiction. By positing the existence of a reservoir of admiralty and maritime jurisdiction included within the judicial power of the United States, Grier completed the consolidation of national government over admiralty jurisdiction. Congress and, consequently, the Court were spared the necessity of reconciling their actions with history and might thereafter look to federalism and congressional power to provide support for the development of admiralty jurisdiction.

X. CONCLUSION

It is clear that the federal judiciary's final construction of the constitutional grant of admiralty and maritime jurisdiction was at considerable variance with what had been in the minds of the framers. The grant began as an instrument of international comity and ended as a usurpation of substantial state interests.

Several factors contributed to this development. In England, the ever-vigilant common law courts restrained admiralty jurisdiction through vigorous and stringent use of the writ of prohibition. Under the Judiciary Act of 1789, the writ was lodged with the Supreme Court, which did not have any stake in limiting the jurisdiction of the lower courts. Although the common lawyers who occupied the early federal benches thought they were applying traditional common law

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159. *Id.* at 320-21.

160. Justice Campbell also wrote a long, vigorous dissent focussing on traditional concerns for jury trial and the encroachment of centralized, absolutist power:

> If the dogma of judges in regard to the system of laws to be administered prevails, then this whole class of cases may be drawn *ad aliud examen*, and placed under the dominion of a foreign code, *whether they arise among citizens or others.* The States are deprived of the power to mould their own laws in respect of persons and things within their limits, and which are appropriately subject to their sovereignty. The right of the people to self-government is thus abridged—abridged to the precise extent, that a judge appointed by another Government may impose a law, not sanctioned by the representatives or agents of the people, upon the citizens of the State. Thus the contest here assumes the same significance as in Great Britain, and, in its last analysis, involves the question of the right of the people to determine their own laws and legal institutions.

Id. at 341.

limitations on admiralty jurisdiction, they often expanded admiralty jurisdiction in cases which in England would have drawn a writ. As traffic on the western river systems began to develop, so did the pressure to have litigation of maritime cases brought into federal court. Maritime law provided a certain, practical, and speedy response to numerous problems which frequently recur in waterborne commerce. To national mercantilists like Story, the admiralty jurisdiction of the federal courts offered an excellent opportunity to develop a uniform commercial law based on cases arising from extensive waterborne commerce.

Critics of admiralty jurisdiction were primarily concerned with the impact of expansion of the federal courts' jurisdiction on the state courts and with the ability of the states to develop substantive law. To allow cases arising wholly within a state to be brought into federal court simply because maritime subject matter was involved violated the careful structure provided by the Diversity Clause and the provisions for jury trial found in the Seventh Amendment. The critics were, nevertheless, too late with their objections and were unable to marshall support in Congress, the one place judicial expansion could have been stopped. When Johnson wrote his critique in *Ramsay*, the district and circuit courts had already outstripped him.

Ultimately, it was the trial courts, faced with the necessity for practical adjudications, that were responsible for the expansion of admiralty jurisdiction. Admiralty jurisdiction was preeminently a matter of striking a balance between sensible jurisdiction and constitutional authority.

William W. Adams